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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/986,346	11/08/2001	John Lawrence Bowers	P64258US2	8502

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3M INNOVATIVE PROPERTIES COMPANY
PO BOX 33427
ST. PAUL, MN 55133-3427

EXAMINER
RIVELL, JOHN A

ART UNIT	PAPER NUMBER
3753	16

DATE MAILED: 07/09/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/986,346	BOWERS, JOHN LAWRENCE	
	Examiner	Art Unit	
	John Rivell	3753	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *11/8/01 (appl), etc.* .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *16-85* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *16-85* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *08 November 2001* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☒ Certified copies of the priority documents have been received in Application No. *08/686,839* .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) *7,14,15* .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

This action is in response to the filing of this Continuation Reissue application of Reissue patent RE 37,974, filed November 15, 1999 and issued February 4, 2003, which is a Reissue of original Patent No. 5,687,767 issued November 18, 1997.

By preliminary amendments filed November 18, 2001, July 30, 2002 and July 31, 2002 original patent claims 1-11 and reissue (RE 37,974) claims 12-15 have been canceled. New claims 16-85 have been added and are pending.

Information Disclosure Statements filed January 23, 2002, February 20, 2003 and March 13, 2003 have been received.

The original patent, or a statement as to loss or inaccessibility of the original patent, must be received before this reissue application can be allowed. See 37 CFR 1.178. As the original patent has in fact been surrendered during a prior prosecution, it is respectfully suggested that applicant supply a statement that the original patent has in fact been surrendered and is located in the file wrapper of application Serial No. 09/442,082, the parent application to this Continuation Reissue application.

An action on the merits of claims 16-85 is as follows.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 48, 49 and 63 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 48 recites the limitation "the seal surface means" in lines 2-3. There is insufficient antecedent basis for this limitation in the claim. Claim 49 is included due to dependency.

Claim 63 recites "a filter mask that has an exhalation valve, constructed in accordance with claim 51 mounted to the mask." Claim 51, a claim dependent from claim 47, recites details of the sealing surfaces of the fixed seat and flexible flap valve. Claim 47, from which claim 63 ultimately depends, recites "a filter face mask that comprises: a mask body...; and an exhalation valve mounted to the mask body..." and further details regarding the valve assembly. In view of the scope of claim 47, the scope and/or intent of claim 63 is not clear as it appears to duplicate that which is already required by claim 47, the claim ultimately from which claim 63 depends.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 55, 57, 58, 62 and 66 are rejected under 35 U.S.C. §102 (b) as being anticipated by Baldwin. The patent to Baldwin discloses "a uni-directional fluid valve that comprises: (a) a flexible flap (12); and (b) a cooperating valve seat (knife edge 11), the seat including a seal surface that surrounds an orifice (through conduit 9), the flexible flap (12) being attached to the valve seat in cantilevered fashion such that the flexible flap (12) makes contact with the seal surface (11) when the flexible flap is

closed and such that a free end (the left end) of the flexible flap lifts from the seal surface (11) when fluid passes in the permitted direction (e.g. from the operators mouth through conduit 9 to the outlet at 7), the flexible flap (12) having a transverse curvature to bias the flexible flap (12) to the seal surface (11) in the absence of a pressure differential across the flexible flap, under any orientation of the valve" as claimed.

Regarding the claimed "transverse curvature" biasing the valve to a closed position, as disclosed in Baldwin the flexible flap is pinched or retained between opposing housing sections 10, 13. The portion 19 of the support rib 18 is the highest point of the downstream side of the flap 12. The remaining portions/surfaces of the remainder of the support at surface 16 and the downstream periphery of the flap 12 are below point 19. Point 19 forms a hinge (column 2, lines 4-20). When assembled, the hinge point 19 presses upwards against the flexible flap at a central point of a chord of the circular flap. Because the surfaces, along the chord at the point 19 leading away from the point 19 in both opposing directions, are lower than the point 19, by reason that this portion of the chord eventually meets the knife edge 11, the point 19 imparts a "transverse curvature" to the flap in both a first plane of the flap, left to right as shown in figure 3 which extends this plane of the flap12 beyond the plane of the seat 11 and a second plane transverse to the first plane extending upwards/downwards forcing the flexible flap beyond the plane of the seat 11. This "transverse curvature" also biases the valve to a closed position (fig. 3) in that ,as disclosed, "to move the valve from the knife edge" the operator exhales into conduit 9 and "when the operator stops blowing

the disc valve 12 returns to the original position against the knife edge as shown in FIG. 3" (column 2,lines 26-33).

Regarding claim 57, in Baldwin "the curvature is imparted to the flexible flap by virtue of its mounting to the valve seat" as claimed.

Regarding claim 58, in Baldwin, "the flexible flap (12) is trapped at a fixed portion of the flexible flap between confronting surfaces of the valve seat (11) and a valve cover" 13 as claimed.

Regarding claim 62, in Baldwin, "the mounting of the flexible flap (12) on the valve seat (11) also imparts a longitudinal curvature to the central section of the flap" as claimed and as shown in fig. 3.

Regarding claim 66, in Baldwin, "the transverse curvature of the flexible flap (12 naturally) decreases in the longitudinal dimension toward a free end of the flap" as claimed in view of the free peripheral end/edge eventually mating with the lower seat 11 as one progresses from the point 19 towards the flaps' peripheral edge.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 16, 17, 19-30, 36-41, 44-46, 60, 61, 64 and 67-69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Japuntich et al. in view of Baldwin. The patent to Japuntich et al. discloses a inhalation filtration mask 12, made of at least one filtration layer 18, adapted to fit over the mouth and nose of a wearer (column 1, lines

56-57, column 2, lines 8-9, etc.). The mask includes an exhalation valve (fig. 3) which includes a self supporting flexible flap 24 mounted in cantilevered fashion to a valve seat generally at 26 (i.e. "upper portion") by pins 40, the flap bending and/or curving upwardly away from a "flat" seat edge 30 of the "upper portion" 26. The "free end" 38 of the flap 24 extends, at all normal orientations of the valve, generally downwardly so as to prevent moisture from exhaled air from rising and condensing on a wearers' eyewear. The cross section of seat edge mat take on any shape such as "square, rectangular, circular, elliptical, etc." (column 5, lines 60-65) Thus the patent to Japuntich et al. discloses all the claimed features with the exception of having a "transverse curvature" imparted to the flexible flap by the mounting of the flap, the "transverse curvature" imposed by a "lower" "cover" member including outlet ports, which "transverse curvature" also imparts closing bias upon the valve to maintain the valve in a closed position. The patent to Baldwin discloses that it is known in the art to employ, as an exhalation valve for the operator, a flexible flap valve 12 in which the mounting of the valve between an upper seat 11 and "lower" "cover" member 12 imparts a "transverse curvature" to the flap valve (via high point 19; see above re: claims 55, 57, 57, 62 and 66) which "transverse curvature" also imparts a closing bias to the valve to maintain the valve closed in any orientation of the valve (since the valve is closed against the effects of gravity as shown in fig. 3 of Baldwin it will be closed in any orientation of the valve relative to gravity) for the purpose of relying on the valve being biased closed by the mounting of the valve between the valve seat and a "cover" rather than relying on the natural resiliency of the valve to maintain the valve closed as is the case in Japuntich et al. It would have been obvious at the time the invention was made to a person having ordinary skill in the art to employ in Japuntich et al. a specific mounting "cover" to mount the flexible flap valve between the seat and "cover" which "cover" imparts a "transverse

curvature" to the flap biasing the flap closed for the purpose of relying on the valve being biased closed by the mounting of the valve between the valve seat and a "cover" rather than relying on the natural resiliency of the valve as recognized by Baldwin.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 55-62 and 66 are rejected under the judicially created doctrine of double patenting over any one of claims 5-9 of U. S. Patent No. RE 37,974 since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

Although they are not identical, the broader limitations of the claims of the instant Reissue application find their equivalence in the more restrictive claims of the Reissue Patent No. RE 37,974. In other words, should one make and/or use the device of the more restrictive Reissued claims, one necessarily has made and/or used the device of the instant Reissue application claims.

Claims 16-54, 63, 64, 65 and 67-85 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over any one of

claims 5-15 of U.S. Patent No. RE 37, 974 in view of Japuntich et al. The device of the respective claims of the reissued patent include all the claimed features of the instant Reissue application claims with the exception of having a face mask, made of filter material to filter out unwanted particulates from the users inhaled volume of air, extend over the nose and mouth of the user. The patent to Japuntich et al. discloses that it is known in the art to employ, as a filtering face mask, a filtration 12, made of filter material, to be located over the mouth and nose of the wearer, including an exhalation valve generally at 14, for the purpose of providing filtration of inhaled air to remove unwanted particulate material (column 2, lines 8-17). It would have been obvious at the time the invention was made to a person having ordinary skill in the art to employ the device of any of claims 5-15 in the device of the Reissued claims as a filtration mask including a mask made of filter material, fitting over the nose and mouth of the wearer for the purpose of providing an inhalate filtration mask filtering out unwanted particles from the wearers inhaled volume of air as recognized by Japuntich et al.

Claim Rejections - 35 USC § 251

The following is a quotation of 35 U.S.C. 251 and 37 CFR. 1.175 which forms the basis for all rejections under 35 U.S.C. § 251 set forth in this Office action:

Reissue of defective patents

35 U.S.C. §251

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue. The Commissioner may issue several reissued patents for distinct and separate parts of the thing patented, upon demand of

the applicant, and upon payment of the required fee for a reissue for each of such reissued patents. The provisions of this title relating to applications for patent shall be applicable to applications for reissue of a patent, except that application for reissue may be made and sworn to by the assignee of the entire interest if the application does not seek to enlarge the scope of the claims of the original patent. No reissued patent shall be granted enlarging the scope of the claims of the original patent unless applied for within two years from the grant of the original patent.

§ 1.175 Reissue oath or declaration

(a) The reissue oath or declaration in addition to complying with the requirements of 1.63, must also state that:
(1) The applicant believes the original patent to be wholly or partly inoperative or invalid by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than the patentee had the right to claim in the patent, stating at least one error being relied upon as the basis for reissue; and
(2) All errors being corrected in the reissue application up to the time of filing of the oath or declaration under this paragraph arose without any deceptive intention on the part of the applicant.
(b)(1) For any error corrected, which is not covered by the oath or declaration submitted under paragraph (a) of this section, applicant must submit a supplemental oath or declaration stating that every such error arose without any deceptive intention on the part of the applicant. Any supplemental oath or declaration required by this paragraph must be submitted before allowance and may be submitted:
(i) With any amendment prior to allowance; or
(ii) In order to overcome a rejection under 35U.S.C. 251made by the examiner where it is indicated that the submission of a supplemental oath or declaration as required by this paragraph will overcome the rejection.
(2) For any error sought to be corrected after allowance, a supplemental oath or declaration must accompany the requested correction stating that the error(s) to be corrected arose without any deceptive intention on the part of the applicant.
(c) Having once stated an error upon which the reissue is based, as set forth in paragraph (a)(1), unless all errors previously stated in the oath or declaration are no longer being corrected, a subsequent oath or declaration under paragraph (b) of this section need not specifically identify any other error or errors being corrected.
(d) The oath or declaration required by paragraph (a) of this section may be submitted under the provisions of 1.53(f).
24 FR 10332, Dec. 22, 1959; 29 FR 18503, Dec. 29, 1964; 34 FR 18857, Nov. 26, 1969; para. (a), 47 FR 21752, May 19, 1982, effective July 1,1982; para. (a), 48 FR 2713, Jan. 20, 1983, effective Feb. 27, 1983; para. (a)(7), 57 FR 2021, Jan. 17, 1992, effective Mar. 16, 1992; revised, 62FR 53131, Oct. 10, 1997, effective Dec. 1, 1997.

The reissue oath/declaration filed with this application is defective (see 37 CFR 1.175 and MPEP § 1414) because of the following:

It is noted that all references to applicants Foreign priority application United Kingdom No. 9515986 in all the oaths of record currently list the filing date of this application as "26 July 1996". A review of this foreign application, as filed on the original patent, indicated that this application was filed 26 July 1995. It is respectfully suggested that applicants records and all future oaths be checked for accuracy in regards to this mater.

The reissue oath/declaration fails to identify at least one error which is relied upon to support the reissue application. See 37 CFR 1.175(a)(1) and MPEP § 1414. As this application is a Continuation Reissue application, the currently filed oath/declaration lists "errors" correctable by reissue which were in the original patent. These "errors" were then corrected during prosecution of the parent Reissue application

Ser. No. 09/442,082 now Reissued Patent RE 37,974. Accordingly, any Reissue oath/declaration filed in a continuation Reissue application must list "errors" allegedly now in the Reissued patent (RE 37,974, Ser. No. 09/442,082). As the original patent has been surrendered in favor of Reissued Patent RE 37,974, there are in fact no "errors" in the original patent because there now is no "original" patent. The act of filing a Continuing Reissue application presumes there are in fact now "errors" in the Reissued Patent (37,974). In accordance with 37 CFR 1.175(b)(1), a supplemental reissue oath/declaration under 37 CFR 1.175(b)(1) must be received before this reissue application can be allowed.

Claims 16-85 are rejected as being based upon a defective reissue oath under 35 U.S.C. 251. See 37 CFR 1.175. The nature of the defect is set forth above.

Receipt of an appropriate supplemental oath/declaration under 37 CFR 1.175(b)(1) will overcome this rejection under 35 U.S.C. 251. An example of acceptable language to be used in the supplemental oath/declaration is as follows:

> "Every error in the patent which was corrected in the present reissue application, and is not covered by a prior oath/declaration submitted in this application, arose without any deceptive intention on the part of the applicant."

Claims 16-85 are rejected under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based. See *Hester Industries, Inc.* v. *Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); *In re Clement,* 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997); *Ball Corp.* v. *United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984). A broadening aspect is present in this reissue which was not

present in the application for patent. The record of the application for the patent shows that the broadening aspect (in this reissue) relates to subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

M.P.E.P. §1412.02 [R-1] Recapture of Canceled Subject Matter

**>A reissue will not be granted to "recapture" claimed subject matter which was surrendered in an application to obtain the original patent. Hester Industries, Inc. v. Stein, Inc., 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); In re Clement, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997); Ball Corp. v. United States, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984); In re Wadlinger, 496 F.2d 1200, 181 USPQ 826 (CCPA 1974); In re Richman, 409 F.2d 269, 276, 161 USPQ 359, 363-364 (CCPA 1969); In re Willingham, 282 F.2d 353, 127 USPQ 211 (CCPA 1960).

TWO STEP TEST FOR RECAPTURE:

In Clement, 131 F.3d at 1468-69, 45 USPQ2d at 1164, the Court of Appeals for the Federal Circuit set forth guidance for recapture as follows:

The first step in applying the recapture rule is to determine whether and in what aspect the reissue claims are broader than the patent claims. For example, a reissue claim that deletes a limitation or element from the patent claims is broader in that limitation's aspect.... Under Mentor [Mentor Corp. v. Coloplast, Inc., 998 F.2d 992, 994, 27 USPQ2d 1521, 1524 (Fed. Cir. 1993)], courts must determine in which aspects the reissue claim is broader, which includes broadening as a result of an omitted limitation....

The second step is to determine whether the broader aspects of the reissue claims relate to surrendered subject matter. To determine whether an applicant surrendered particular subject matter, we look to the prosecution history for arguments and changes to the claims made in an effort to overcome a prior art rejection. See Mentor, 998 F.2d at 995-96, 27 USPQ2d at 1524-25; Ball Corp. v. United States, 729 F.2d 1429, 1436, 221 USPQ 289, 294-95 (Fed. Cir. 1984).

In every reissue application, the examiner must first review each claim for the presence of broadening, as compared with the scope of the claims of the patent to be reissued. A reissue claim is broadened where some limitation of the patent claims is no longer required in the reissue claim; see MPEP § 1412.03 for guidance as to the nature of a "broadening claim."

Where a claim in a reissue application is in fact broadened, the examiner must next determine whether the broader aspects of that reissue claim relate to subject matter that applicant previously surrendered during the prosecution of the original application (which became the patent to be reissued). Each limitation of the patent claims, which is omitted or broadened in the reissue claim, must be reviewed for this determination.

CRITERIA FOR DETERMINING THAT SUBJECT MATTER HAS BEEN SURRENDERED:

If the limitation now being omitted or broadened in the present reissue was originally presented/argued/stated in the original application to make the claims allowable over a rejection or objection made in the original application, the omitted limitation relates to subject matter previously surrendered by applicant, and impermissible recapture exists. >See MPEP § 706.02(l)(1) with respect to amendments made to distinguish the claimed invention from 35 U.S.C. 102(e)/103 prior art which was commonly owned or assigned at the time the invention was made.<

The examiner should review the prosecution history of the original application file (of the patent to be reissued) for recapture. The prosecution history includes the rejections and applicant's arguments made therein. The record of the original application must show that the broadening aspect (the omitted/broadened limitation(s)) relates to subject matter that applicant previously surrendered.

For example, originally filed apparatus claims 1-8 and currently filed apparatus claims 55-62 are of similar, if not the very same, scope. During prosecution of originally filed application Serial No.08/686,839 an action mailed November 13, 1996 included a rejection of claim 1 among other claims. In response thereto applicant filed a response on March 13, 1997 canceling then claim 1 and adding new claim 12 in its place. Claim 12, as first introduced added language, relative to the claims prior to the introduction of claim 12, to distinguish over the applied McKenna reference, namely, that the flap is attached to the root end of the flap, and that the flap is free to flex away from the seat

"at its free end along at least portions of its side edges." Further, on pages 8-9 of the remarks attached to applicants response, applicant argues, with particularity, the allowability of now claim 12 over the reference to McKenna, in terms similar to that used in new claim 12. In response thereto, the Office issued a Final rejection, dated April 29, 1997, in view of McKenna of claims 12+. In further response after Final, dated June 12, 1997 and by facsimile dated June 25, 1997 applicant amended claim 12 further, by adding language to distinguish now amended claim 12 over the reference to McKenna eventually resulting of allowance of U. S. Pat No. 5,687,767 the subject Patent of this Continuing Reissue application.

By comparison of the patent claims of U. S. Pat No. 5,687,767 and the claims at issue here in this application, it is clear that the claims at issue here in this continuing Reissue application include subject matter omitted in the present Reissue application, which subject matter was "omitted/argued/stated in the original application to make the claims of the original application allowable over a rejection or objection made in the original application". Such omission constitutes impermissible recapture.

Claims 18, 42, 43, 56, 59 and 65 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims and the rejections under Double Patenting and Recapture, set forth in this Office action were overcome.

Claims 31-35, 47-54 and 70-85 would be allowable if rewritten or amended to overcome the rejection(s) under Double Patenting and recapture, set forth in this Office action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to John Rivell whose telephone number is (703) 308-2599. The examiner can normally be reached on Monday –Thursday between 6:30am and 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Bertsch can be reached on (703) 308-0975. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0861.

j.r.
May 6, 2003

John Rivell
Primary Examiner
Art Unit 3753